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No. 94-1174 and No. 94-1177

In The

Supreme Court of the United States

October Term, 1994

RICHARD D. GRIFFITH, et al.

Petitioners,

vs.

COLLIER COUNTY, FLORIDA, et al.

Respondents.

and

HOBART C. BISHOP, et al.

Petitioners,

vs.

COLLIER COUNTY, FLORIDA, et al.

Respondents.

RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT, STATE OF FLORIDA

January 27, 1995

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QUESTION PRESENTED

Whether the Florida Second District Court of Appeal correctly determined that the Florida Legislature did not violate petitioners' due process rights when the Legislature ratified a tax that Collier County, Florida had levied and collected in a procedurally defective manner under state legislative taxing authority, where it is undisputed that the Legislature could have authorized the County to levy the tax in the manner it did in the first place and where the Legislature acted to ratify the tax after petitioners commenced suit seeking refunds but before petitioners prosecuted their refund claims to judgment.

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JURISDICTIONAL STATEMENT

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257 to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." As petitioners describe, the Florida Second District Court of Appeal disposed of petitioners' constitutional challenge to the validity of the legislation at issue in this case. Following that, the Florida Supreme Court declined to grant discretionary review of the Second District's decision. Accordingly, although petitioners Richard D. Griffith, et al., have styled their petition as a "Petition for Writ of Certiorari to the Florida Supreme Court," petitioners in fact seek review of the Second District's decision rejecting petitioners' constitutional challenge.

In its decision, the Second District reversed the trial court's order granting petitioners' motion for summary judgment on the issue of liability on the part of Collier County for the refund of the disputed taxes. The Second District remanded the case "for further proceedings consistent with" the Second District's opinion. (Appendix to Petition of Hobart C. Bishop, et al., A-5). Although the Second District's opinion contemplates that further proceedings will occur in the trial court, as a practical matter the Second District's determination that the Florida Legislature's action in ratifying the disputed taxes was constitutional disposes of petitioners' claim for refunds. Accordingly, entry of judgment for respondents in the trial court should amount to a ministerial act. In these circumstances, the Second District's determination of this cause may be deemed a "final judgment." E.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479 (1975); Robert L. Stern, Eugene Gressman, et al., Supreme Court Practice, § 3.6, p. 100 (Bureau of National Affairs, 7th ed. 1993).

STATEMENT OF THE CASE AND FACTS

Petitioners ask this Court to grant a writ of certiorari to review the decision of the Florida Second District Court of Appeal reversing the trial court's summary judgment upholding petitioners' claims to the refund of taxes collected by respondent Collier County. The background of this dispute may be briefly stated.

In 1990, Collier County enacted Ordinance No. 90-43 providing for the collection of taxes from persons renting accommodations in the County. The County enacted Ordinance 90-43 pursuant to the Local Option Tourist Development Act (the "Tourist Development Act"), Section 125.0104, Fla. Stat. (1987). Before the County began collecting the tax, various hotel operators brought suit in the trial court to invalidate the tax on the ground that, in enacting Ordinance No. 90-43, the County had omitted a procedural step provided for in Section 125.0104(4) of the Tourist Development Act: namely, the County did not first obtain a plan for implementing the tax from an advisory body called the "tourist development council."

The hotel operators' suit called upon the court to construe the section of the Tourist Development Act captioned "Ordinance Levy Tax; Procedure." Section 125.0104(4), Fla. Stat. (1987) (emphasis added). This section prescribed certain procedures by which counties might implement the tourist development tax, including the use of a tourist development council. The statute directed that a County establish a tourist development council prior to levying a tax. The statute provided that the tourist development council was an "advisory" body. Section 125.0104(4)(e). (Appendix to Petition of Hobart C. Bishop, et al., A-31). The statute further specified that the tourist development council "shall prepare and submit to the governing board of the county for its approval a plan for tourist development." Section 125.0104(4)(c) (emphasis added). (Id., A-31).

Although Collier County established a tourist development council under the Tourist Development Act, the council declined to submit a plan to the County, taking it upon itself to protest the Tourist Development Act as "flawed." (R. 26). The Tourist

Development Act nowhere contemplated that the tourist development council might decline to discharge its responsibility to prepare a plan based on a disagreement with the enabling legislation; nor did the statute expressly address what might be done procedurally if that occurred.

Having consulted with its advisory council, the County Commission determined that it must deem the response it received as some sort of advisory proposal, which the County Commission had the prerogative to reject. Subsequently, the County enacted Ordinance No. 90-43, which was then approved by referendum.

The hotel operators contended in their challenge to the Ordinance that, although the tourist development council was an advisory body, the County could not levy a tax without somehow obtaining a plan for tourist development from that council. The trial court rejected the hotel operators' challenge. Having obtained the trial court's imprimatur of its Ordinance, the County proceeded to collect the taxes.

On appeal from the trial court's initial decision, the Second District reversed. See Freni v. Collier County, 588 So. 2d 291 (Fla. 2d DCA 1991). The Second District held on that prior appeal that the submission of a plan by the tourist development council was a procedural prerequisite to the levy of the tax.

After the issuance of the Second District's first decision, the petitioner taxpayers brought suit for refunds of the taxes that had been collected under Ordinance No. 90-43 prior to that decision. These taxpayers were not parties to the hotel operators' suit that culminated in the Second District's earlier decision. In that earlier suit, the hotel operators had asserted no claim for refunds; nor had they sought any disposition of taxes collected under the disputed ordinance.

While the petitioner taxpayers' suit for refunds was pending, but before it had proceeded to judgment, the Legislature passed a curative law ratifying the previously imposed taxes that

had been collected without benefit of a plan by the tourist development council. See Section 125.0104, Fla. Stat. (1993) ("Curative Act"). In the trial court, petitioners thereupon challenged the Curative Act on the ground that it violated due process by operating retroactively to validate the subject taxes. Erroneously believing that the Second District's prior decision controlled the outcome of this constitutional challenge, the trial court ruled in the taxpayers' favor and granted the taxpayers' motion for summary judgment on the issue of the County's liability to pay the tax refunds.

The Second District reversed. The court held that "[a]lthough the tourist tax was subject to invalidation for want of following the procedural requirements of the Act, the legislature acted within its capacity in ratifying the tax by providing a means to correct the procedural defect of the absence of a plan for tourist development." (Appendix to Petition of Hobart C. Bishop, et al., A-6).

Subsequently, petitioners sought review of the Second District's decision in the Florida Supreme Court. The Florida Supreme Court declined to review that decision.

SUMMARY OF ARGUMENT

In sustaining the validity of the curative legislation at issue here, the Second District adhered to well-settled precedent of this Court. Over the years, this Court has established guideposts on when and how the United States Congress or a state legislature may ratify taxes levied and collected in a procedurally improper manner, and the Second District faithfully followed those guideposts in this case. Further, although petitioners imply -- without arguing -- that the Second District's decision conflicts with decisions of the courts of other states, no such conflict exists. Accordingly, the petitions for a writ of certiorari should be denied.

ARGUMENT

Petitioners ask this Court to exercise its discretion to review the Second District's decision on the ground that it "is an affront to constitutional due process and stands as a dangerous precedent." (Petition of Hobart C. Bishop, et al., p. 4). Petitioners further exhort this Court to "confirm that its holdings" in prior decisions "continue to restrain legislatures from destroying vested claims for recovery of unauthorized taxes." (Ibid.; see also Petition of Richard D. Griffith, et al., p. 18).

There is nothing about petitioners' challenge or the Second District's decision that warrants plenary review by this Court. To the contrary, the decision in this case is quite pedestrian: It follows principles settled for almost a century by decisions of this Court.

1. In ruling in the County's favor, the Second District relied explicitly on this Court's decision in United States v. Heinszen, 206 U.S. 370 (1907). In Heinszen, the Court held that the legislature may ratify an unauthorized tax levy after it has been invalidated by the courts if the legislature would have had the power to authorize the levy in the first place in the manner in which the tax was imposed. Specifically, the Court stated that, when the legislature "possessed the power to have authorized [the]

imposition [of taxes] in the mode in which they were enforced," then "from the very moment of collection, a right in [the legislature] to ratify the transaction, if it saw fit to do so, was engendered." Id. at 386.

The Court in Heinszen further held that, when the legislature exercises its prerogative to ratify a previously invalidated tax levy, this does not impermissibly impair any "vested" right of the taxpayer to prosecute a pending suit for refund to judgment. In this connection, in upholding the validity of a curative law ratifying taxes that this Court had previously invalidated, the Court in Heinszen held:

> Nor does the mere fact that, at the time the ratifying statute was enacted, this action was pending for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence, if it be conceded that the capacity to prosecute the pending suit to judgment was, in a sense, a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. Id. at 387 (emphasis added).

In its first decision, the Second District had faulted the County's original imposition of the tax solely because of the County's failure to follow the procedural step of first obtaining a plan from the tourist development council. Petitioners freely conceded in seeking review by the Florida Supreme Court that "[t]he Legislature's 1987 enabling legislation could well have dispensed with or limited the role of TDC's [tourist development councils]" in the imposition of the disputed taxes. (Bishop's Jur. Br., at 8)

This point is dispositive of petitioners' challenge. As Heinszen holds, and as the Second District recognized in its decision below, so long as the legislature could have authorized the

imposition of the tax in the first place in the manner imposed -- here, without benefit of a plan by the tourist development council -- then, "from the very moment of collection, a right in [the legislature] to ratify the transaction, if it saw fit to do so, was engendered." Heinszen, 206 US at 386. That is exactly what occurred in this case. Nonetheless, petitioners attack the Second District's decision for two reasons.

First, petitioners imply that Heinszen has somehow lost its force, by the passage of time or otherwise. But petitioners conceded at oral argument before the Second District that Heinszen is still good law. And it is in fact recognized today as the leading case in the area of the constitutionality of curative legislation.[1/]

Second, petitioners contend that a different decision of this Court should control the outcome of this case, namely, Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 258 US 338 (1922). But it is Forbes and not Heinszen that is distinguishable from the case at bar.

It should be noted that this Court itself has admonished that Forbes must be carefully limited to its particular facts. The Forbes decision contained dictum purporting to restrict the application of the doctrine of ratification. The Court in Forbes, however, limited that language virtually as it was uttered, noting in the Forbes opinion itself that "[i]t is true that the doctrine of ratification has been carried somewhat beyond the point that we indicate." 258 U.S. at 339. Subsequently, in discussing Forbes, this Court

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[1/] See, e.g., Canisius College v. United States, 799 F. 2d 18, 26 (2d Cir. 1986), cert. denied, 481 US 1014 (1987); Hochman, C., The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 704 (1960) (noting that it is well recognized that curative laws "include[] those statutes which ratify prior official conduct of government officers who have acted without the requisite authority," and noting that "[t]he leading case in this area is United States v. Heinszen & Co.").

U.S. at 339. Subsequently, in discussing Forbes, this Court emphasized that "[t]he case concedes the power of ratification . . . and necessarily recognized the subjection and obligation of persons and property to government . . . [and] the recognition precludes a misunderstanding of the case and its extension beyond its facts." Charlotte Harbor & N. Ry. co. v. Welles, 260 US 8, 12 (1922) (emphasis added).

The facts of Forbes disclose that the government agency there levied tolls for the use of canal locks without the benefit of any express power to levy tolls whatsoever. As the Florida Supreme Court made clear in that case, "[a] careful examination of the acts of the Legislature [applicable to the Everglades district where the tolls were levied] [did] not reveal any express power or authority granted the defendant in error to levy a toll upon boats passing through the lock in question." Forbes Pioneer Boat Line v. Board of Commissioners, 77 Fla. 742, 82 So. 346, 351 (1919) (emphasis added). Thus, in the Second District, petitioners were relegated to arguing that, in Forbes, "the power to collect tolls was implied." (Answer Brief of Appellees Bishop, et al., p. 16 n. 12) (emphasis added). Here, by contrast, the County imposed its tax levy under the express statutory authority of the Tourist Development Act, albeit in a procedurally defective manner.[2/]

[2/] See also Graham v. Goodcell, 282 US 409, 427 (1931) ("defects in the administration of the law may be cured by subsequent legislation without encroaching upon constitutional right, although existing causes of action may thus be defeated"). Petitioners erroneously contend that the Second District's decision is somehow at odds with Graham. To the contrary, Graham supports the Second District's decision by recognizing that the legislature can enact curative legislation to rectify; among other things, failures by government officials to comply with statutory requirements.

By the same token, petitioners mistakenly rely on other decisions of this Court upholding the validity of various types of

(continued...)

This is significant because this Court recognized in Forbes that a broad legislative prerogative exists to ratify unauthorized "acts done in the name of the Government by those who assume to represent it." 258 U.S. at 339. Indeed, this Court has specifically held that curative legislation may apply not only to defeat a claim for refund but to override even a final judgment granting a tax refund where, as here, the taxing authority collected the taxes under the ostensible authority of a general law, even though the taxing authority was mistaken in its belief that the requisite authority existed. Rafferty v. Smith, Bell & Co., 257 U.S. 226 (1921). As this Court has explained, "a judgment for the restitution of taxes collected under the ostensible authority of a general statute will be reversed when, after the rendition of such judgment, a statute has been passed legalizing and ratifying such taxation." Hodges v. Snyder, 261 U.S. 600, 604 (1923). Petitioners have conceded in this case that Collier County's tax was enacted under the "ostensible legislative authority [of] Florida Statutes § 125.0104." (R. 458).

In addition, not only was there no enabling legislation in Forbes for the levy of any taxes, but the legislation that did exist affirmatively assured the public that no toll would be charged. Thus, the Court in Forbes emphasized that "[i]t would seem from the first decision of the Court below that the transaction [taxed] was not one for which payment naturally could have been expected." 258 U.S. at 340. The "first decision of the Court below," which invalidated the tolls prior to enactment of the curative law, pointed out that the legislation establishing the Everglades drainage district assured the public that it was "entitled

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[2/](...continued)
pp. 8-11). Petitioners do not cite a single decision by this Court other than Forbes that struck down such legislation. At best, petitioners are reduced to distinguishing these other decisions. Petitioners do not and cannot distinguish this Court's decision in Heinszen, however, from this case. And Heinszen is controlling.

to the free use of such waterways." Forbes, 82 So. 346, 351 (Fla. 1919) (emphasis added).

Here, by contrast, far from assuring renters that no charge would be exacted for the privilege of renting accommodations in this state, the Tourist Development Act made plain that "every person" who rents accommodations for a specified term "is exercising a privilege which is subject to taxation." Section 125.0104(3)(a), Fla. Stat. (1977) (emphasis added). Indeed, prior to the time that petitioners paid the tax, the trial court had issued its initial decision upholding the tax.

Finally, petitioners concede that curative laws may be applied constitutionally to rectify a failure on the part of the taxing authority to follow statutorily required procedures. This Court in Forbes likewise acknowledged that curative laws may be applied to defeat taxpayer claims when the invalidity of the earlier agency action stems from a "technical defect" in the administration of a law, as distinguished from the omission of enabling legislation. 258 U.S. at 339. Here, the Second District invalidated the County's ordinance originally because the County enacted it in a procedurally improper manner. In fact, in the trial court, petitioners conceded that "a careful reading of the Amended Complaint . . . shows that Plaintiffs do not dispute or challenge the general authority of Defendants to enact a tourist development tax under Fla. Stat. § 125.0104, but rather challenge and dispute the defective procedures employed by Defendants in enacting a particular tourist development tax . . . ." (R. 520, 535). As the Second District correctly recognized, then, it is Heinszen and not Forbes that controls the outcome of this case.

Thus, the Second District's decision comports with long-established authority and well-accepted principles. Petitioners' admonitions about the far-reaching ramifications of the Second District's decision is merely the familiar argument of a party disappointed over the outcome of an appeal.

2. In the same vein, petitioners Hobart C. Bishop, et al., contend that this Court must intercede in this case because "the Board of Commissioners . . . deliberately and knowingly ignored the limits of its authority." (Petition of Hobart C. Bishop, et al., p. 10). Petitioners insist that a legislature may act to ratify prior tax levies only to cure "unintended defects" or "inadvertent" mistakes by agencies charged with the job of carrying out a tax. (Id. at 8-9). This argument is flawed for at least two reasons.

First, petitioners mischaracterize the County's actions. By the time the County collected the disputed taxes from petitioners, the trial court had denied the hotel operators' request to enjoin the referendum on the County's original Ordinance, the Second District had affirmed the decision denying the injunction, the Ordinance was in effect, and the trial court had entered its final order upholding the Ordinance. This confirms, at a minimum, that the County's authority to levy the tax in the first instance was colorable.

When the Second District reversed the trial court's initial decision, the County ceased levying the taxes and escrowed the moneys already collected. This is hardly a case, then, where the Florida Legislature has acted to ratify the actions of "rogue" tax collectors run amuck -- as petitioners contend. (Id. at 10).

More fundamentally, it can always be said -- in hindsight -- that a taxing authority acted in the face of procedural limitations on its authority, or in the absence of authority, in levying a tax that has been subsequently invalidated by the courts. Likewise, it can always be said that the tax collectors had reason to know that they were doing so, inasmuch as the taxpayers suspected it and the courts ultimately confirmed it. Yet, the courts have time and time again upheld the power of the legislature to ratify previously unauthorized or procedurally defective tax levies for the express purpose of cutting off taxpayer suits for refund.

For example, in Graham v. Goodcell, 282 U.S. 409 (1931), this Court ratified the collection of taxes by the Internal

Revenue Service after the statute of limitations had run on those taxes. The IRS collected those taxes based on a Treasury regulation that provided that the statute of limitations did not apply to collection of taxes by distraint proceedings, the common method of enforcing payment. Thus, the IRS did not allow the statute to run through inadvertence, but based on a deliberate judgment that the IRS could nonetheless collect the taxes due.

Ultimately, this Court in Graham repudiated the IRS's interpretation of its enabling legislation, and, predictably, taxpayers commenced claims for refunds based on this Court's decision. Against that background, Congress enacted legislation ratifying the IRS's collection of the disputed taxes. In sustaining that legislation, this Court acknowledged that "it was the purpose of the Congress that payments made in the circumstances described . . . should not be refunded." 282 U.S. at 418.

Likewise, in sustaining the legislation ratifying the collection of the disputed taxes in Heinszen, this Court recognized that the President had imposed those taxes by fiat, without authority, and this Court in three separate cases had conclusively held that the President was "without power . . . in the absence of express authority from Congress, to impose the tariff duties in question" and that the "imposition of the duties . . . was unlawful." 206 U.S. at 380 (emphasis added). Still, this Court upheld Congress' authority to ratify those taxes and thus to cut off pending suits for refund of the taxes.

Thus, petitioners' submission that the Second District in this case misapplied applicable law to uphold some kind of abuse of authority by either the County or the Florida Legislature is meritless.

3. In a final effort to demonstrate that this Court should grant the writ to review the Second District's decision in this case, petitioners Bishop, et al., imply – but do not directly argue – that the Second District's decision conflicts with decisions of other state courts. (Petition of Hobart C. Bishop, et al., pp. 12-14).

Petitioners Griffith, et. al, make no attempt to assert that such a conflict exists.

In this connection, petitioners Bishop, et al., point out that this Court dismissed an appeal (for want of a substantial federal question) from the state court decision in State ex rel. Emmerik v. Janklow, 304 N.W. 2d 700 (1981), in which the South Dakota Supreme Court rejected a constitutional challenge to state legislation that ratified taxes collected twelve years earlier. Plainly, the Second District's decision in this case does not conflict with either the ruling of the South Dakota Supreme Court upholding such legislation or with the decision of this Court in Emmerik dismissing an appeal from the state court's decision for want of a substantial federal question. If anything, this Court's decision in Emmerik further demonstrates that the Second District's decision in this case accords with governing law.

Petitioners insist, however, that, in dissent in Emmerik, Justice White suggested that the decision in Emmerik was in "apparent" conflict with a decision of the Maryland Court of Appeals in Washington National Arena Limited Partnership v. Treasurer, 287 Md. 38, 410 A.2d 1060, cert. denied, 449 U.S. 834 (1980). As we have shown, the Second District's decision in this case does not conflict with Emmerik. Nor does it conflict with Washington National.

In Washington National, a county was given legislative authority in 1968 to impose a recordation tax at a rate of $1.10. In the face of that authority, the county imposed a tax at a rate of $1.65. Eight years later, in 1976, the state legislature enacted a statute purporting to authorize the county's collection of the higher tax. The court in Washington National held that the case was more like this Court's decision in Forbes than Heinszen because, in both Forbes and Washington National, the taxing authorities had acted to impose a tax in the face of affirmative assurances by the state legislature as to "what, if anything, should be charged by the government." 410 A. 2d at 1067.

Specifically, the court in Washington National emphasized that this Court in Forbes had "pointed out that, in light of the decision of the Florida court below interpreting the Commissioner's statutory authority, the 'transaction was not one for which payment naturally could have been expected.'" Ibid., quoting Forbes, 258 U.S. at 340. As we have discussed, the legislation at issue in Forbes affirmatively assured the public that use of the waterways would be free.

Likewise, in Washington National, the court pointed out that the county had acted to collect the higher tax in the face of legislation expressly assuring the public that the tax would be less. Because the discrepancy related to the critical issue of the amount of the tax, the court in Washington National held that the legislature could not renege on the assurance that it had previously given on this issue.

As we have discussed, in this case, in contrast to Forbes and Washington National, at the time petitioners rented accommodations the Tourist Development Act gave no assurances that petitioners would not be taxed or that they would be taxed at some favorable rate. To the contrary, in enacting the Tourist Development Act the Florida Legislature made plain all along that "every person" who rents accommodations for a specified term "is exercising a privilege which is subject to taxation." Section 125.0104(3)(a), Fla. Stat. (1977).

Further, the court in Washington National hastened to acknowledge that where, as here, the taxing authority has failed to comply with a procedural or technical requirement of the enabling statute, the legislature can constitutionally ratify the defective tax levy after the fact. 410 A. 2d at 1067. It is precisely that authority that the Second District sustained in holding, "Although the tourist tax was subject to invalidation for want of following the procedural requirements of the Act, the legislature acted within its capacity in ratifying the tax by providing a means to correct the procedural defect of the absence of a plan for tourist

development." (Appendix to Petition of Hobart C. Bishop, et al., A-6) (emphasis added).

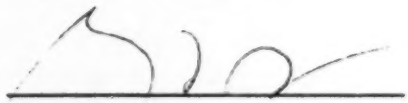
Accordingly, the Second District's decision is consistent with all the cases upon which petitioners rely.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for a writ of certiorari.

January 27, 1995

Respectfully submitted,



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